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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ewing Redmond Samuels,

10 Petitioner,

11 v.

12 Charles L Ryan, et al.,

13 Respondents.
14

No. CV-19-02754-PHX-ROS

ORDER

15 Magistrate Judge Eileen S. Willet recommends Petitioner Ewing Redmond
16 Samuels' petition for writ of habeas corpus be denied. (Doc. 30). Petitioner filed
17 objections as well as two separate documents titled "Motion for Relief," apparently
18 containing additional objections. (Doc. 31, 32, 35). Respondents then filed a reply,
19 attempting to respond to Petitioner's objections. (Doc. 36). Upon review, the Magistrate
20 Judge's recommendation is correct and the petition will be denied.

21 **BACKGROUND**

22 The factual and procedural history regarding Petitioner's convictions are undisputed
23 but a brief overview is necessary to understand the nature of Petitioner's objections. After
24 a jury trial, Petitioner was convicted in state court of two counts of aggravated assault and
25 one count of unlawful imprisonment. Petitioner was sentenced to a total of 7.5 years'
26 imprisonment. Petitioner filed a direct appeal.

27 On February 7, 2018, Petitioner's appellate counsel filed an *Anders* brief stating he
28 had searched the record but was unable to find an "arguable question of law that [was] not

1 frivolous.” (Doc. 5-1 at 12). The next day, the court of appeals gave Petitioner until March
2 20, 2018, to file a pro se supplemental brief. (Doc. 25-1 at 218). Instead of filing a
3 supplemental brief, Petitioner filed a series of motions complaining about his counsel.

4 On February 20, 2018, Petitioner filed three motions with the court of appeals: a
5 “Motion Objecting to *Anders* Brief”; a “Motion for Stay Pending Preparation of All
6 Records on Appeal”; and a “Motion for the Appointment of New Counsel.” (Doc. 25-1 at
7 218). On February 26, 2018, the court of appeals denied those motions but extended the
8 time for Petitioner to file his supplemental brief until March 30, 2018. Petitioner again
9 chose to file motions instead of a supplemental brief. On March 23, 2018, Petitioner filed
10 a “Motion to Strike *Anders* Brief and Dismiss Unlawfully Appointed Counsel with
11 Irreconcilable Conflict of Interest and Appoint Direct Appeal Counsel.” And on March
12 30, 2018, Petitioner filed a “Motion to Supplement the Record on Appeal and Request to
13 Extend Time to File Supplemental Brief Until the Record is Supplemented.” Those
14 motions were denied on April 5, 2018, and April 11, 2018.

15 On April 24, 2018, Petitioner filed a “Motion for Reconsideration” and a “Notice of
16 Record.” (Doc. 25-1 at 149). The Motion for Reconsideration, although not entirely clear,
17 seemed to argue Petitioner had been denied counsel “for an extended period of time” and
18 Petitioner requested an unidentified additional amount of time to file a supplemental brief.
19 (Doc. 25-1 at 151). The “Notice of Record” presented a list of issues Petitioner wished to
20 have reviewed. Many of the listed issues, however, contained no meaningful identification
21 of the issue Petitioner planned to argue. For example, one issue stated, in its entirety: “The
22 trial judge committed an error of law in the process of reaching a discretionary conclusion,
23 abusing the court’s discretion. State v. Francis, 222 Ariz at 426, 215 P.3d at 400.” (Doc.
24 35 at 15). The court of appeals denied the “Motion for Reconsideration” on May 14, 2018
25 but took no action regarding the “Notice of Record.”

26 On June 8, 2018, Petitioner filed a document with the Arizona Supreme Court titled
27 “Petition for Review.” (Doc. 25-1 at 201). That document argued the court of appeals
28 should have granted Petitioner more time to file his pro se supplemental brief. Petitioner

1 attached his “Direct Appeal Supplemental Brief” to his filing in the Arizona Supreme
2 Court. (Doc. 25-1 at 205). The Arizona Supreme Court did not take immediate action on
3 the petition for review. But the brief that Petitioner attached to his Arizona Supreme Court
4 filing was not filed with the Arizona Court of Appeals. On August 16, 2018, the Arizona
5 Court of Appeals affirmed Petitioner’s convictions and sentences. (Doc. 5-1 at 18). In
6 doing so, the court of appeals noted Petitioner had not filed a supplemental brief. The court
7 of appeals’ decision prompted Petitioner to file yet more motions with that court.

8 On August 31, 2018, Petitioner filed another “Motion for Reconsideration” and on
9 September 10, 2018, Petitioner filed a “Motion Requesting Permission to Amend Motion
10 for Reconsideration.” (Doc. 25-1 at 158). It appears Petitioner wished to make minor
11 changes to the text of his August 31 motion and include additional attachments. (Doc. 25-
12 1 at 159). One of the proposed additional attachments was a document titled “Issues for
13 Appellate Review.” (Doc. 25-1 at 170). That document consisted of a list of ten issues
14 Petitioner wished to raise on appeal. On November 1, 2018, before the court of appeals
15 acted on Petitioner’s filings, the Arizona Supreme Court denied the petition for review.
16 (Doc. 25-1 at 208).

17 On December 7, 2018, the court of appeals granted the motion to amend the motion
18 for reconsideration but then denied the motion for reconsideration itself. (Doc. 25-1 at
19 200). Petitioner did not seek review by the Arizona Supreme Court. After the conclusion
20 of his direct review proceedings Petitioner did not pursue post-conviction relief in the trial
21 court.¹

22 In April 2019, Petitioner filed his federal petition for writ of habeas corpus.
23 Petitioner then filed several “supplements.” The Court interpreted Petitioner’s numerous
24 filings as raising five claims related to his convictions:

- 25 1. Violation of Petitioner’s due process and equal protection rights because the

26
27 ¹ There were some filings related to a premature post-conviction petition but that premature
28 petition was dismissed. On December 10, 2018, the superior court granted Petitioner’s
request to dismiss the counsel that had been appointed to handle his post-conviction relief
petition. (Doc. 25-1 at 147). Petitioner was allowed to proceed pro se but Petitioner never
filed a petition for post-conviction relief.

1 indictment was based on hearsay and perjured testimony.

2 2. Violation of Petitioner's due process and equal protection rights because the state
3 concealed impeachment and exculpatory evidence.

4 3. Violation by police officers and prosecutors of Petitioner's due process rights,
5 equal protection rights, privacy rights, and the right to be protected from
6 unreasonable searches and seizures.

7 4. Violation of Petitioner's due process, equal protection, and Confrontation Clause
8 rights by prosecutorial misconduct.

9 5. Violation of Petitioner's right to effective assistance of trial and appellate counsel.

10 (Doc. 9 at 2). Respondents answered the petition and asserted all five of Petitioner's claims
11 were procedurally defaulted without excuse. (Doc. 25). Respondents pointed out that
12 Petitioner had not raised any claims in his direct appeal nor did he raise any claims in a
13 post-conviction relief proceeding. Therefore, Respondents argued the federal petition
14 should be denied on procedural grounds.

15 On March 6, 2019, the Magistrate Judge issued a Report and Recommendation
16 concluding all of Petitioner's claims were procedurally defaulted without excuse.
17 Petitioner filed objections as well as a document titled "Motion for Relief" and, a few
18 weeks later, a different document also titled "Motion for Relief." (Doc. 32, 35). Those
19 latter two documents appear to contain additional objections. Viewing all of his objection-
20 related documents together, it appears Petitioner's main objection is that he *did* present
21 "four of [his] five claims" to the state court of appeals as "evidenced in his motion for
22 reconsideration." (Doc. 31 at 10). The motion for reconsideration Petitioner is referencing
23 was filed in September 2018, a month after the Arizona Court of Appeals affirmed his
24 convictions. (Doc. 25-1 at 158). Petitioner also argues that he presented some claims in
25 the petition for review he filed with the Arizona Supreme Court. (Doc. 35 at 4). Finally,
26 Petitioner argues even if he did not exhaust his claims in state court, that failure should be
27 excused.

ANALYSIS

To properly exhaust his claims, Petitioner was required to present those claims to the Arizona courts in a procedurally proper manner. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) (“[W]e ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies . . .”). Under Arizona law, claims that must be raised in a direct appeal must be raised in the opening brief. Failure to do so means those claims are waived. *State v. Guytan*, 968 P.2d 587, 593 (Ariz. Ct. App. 1998). By submitting a brief that did not raise *any* claims, Petitioner effectively waived all claims that should have been raised on direct appeal. Petitioner argues he raised his claims by listing them in connection with his motion for reconsideration filed after the court of appeals affirmed his convictions. But Petitioner cites no authority that Arizona law allowed him to wait until after the resolution of his appeal to raise claims in a motion for reconsideration. Petitioner also argues the brief he attached to the petition for review he filed with the Arizona Supreme Court should have been sufficient to raise his claims. But there is no indication that brief was filed with the Arizona Court of Appeals and, in fact, the court of appeals’ decision states no such brief was filed. It is undisputed that it is now too late for Petitioner to raise any claims in state court. Therefore, all claims that should have been raised in Petitioner’s direct appeal are procedurally defaulted.

Petitioner’s federal petition asserts a claim for ineffective assistance of trial and appellate counsel. Arizona law did not require that claim be raised on direct appeal. *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002) (holding ineffective assistance of counsel claim should not be raised on direct appeal). But Arizona law did require Petitioner raise that claim in a state post-conviction relief petition. *Id.* Petitioner never filed such a petition and it is too late to do so now. Therefore, this claim is also procedurally defaulted.

Because Petitioner did not raise his claims in a procedurally proper manner in state court, he cannot pursue them here unless he “can show either cause and prejudice or a fundamental miscarriage of justice.” *Clark v. Chappell*, 936 F.3d 944, 982 (9th Cir. 2019). On the “cause” aspect of the “cause and prejudice” inquiry, Petitioner “must show that

1 some objective factor external to the defense impeded [his] efforts to comply with the
2 State's procedural rule." *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017). Thus, Petitioner
3 must point to the circumstances that prevented him from filing a brief during his direct
4 appeal or a petition for post-conviction relief after the direct appeal ended. Petitioner
5 appears to argue the Arizona Court of Appeals prevented him from filing a supplemental
6 brief on his direct appeal but that is not accurate.

7 The Arizona Court of Appeals informed Petitioner on February 8, 2018, that he
8 needed to file a supplemental brief no later than March 20, 2018. That deadline was later
9 extended to March 30, 2018. Thus, Petitioner had approximately six weeks to file a
10 supplemental brief. Instead of filing such a brief, Petitioner filed a variety of other motions,
11 mostly complaining about his counsel. Petitioner has never explained why he was unable
12 to file a supplemental brief in the time he was allotted. The Arizona Court of Appeals did
13 not prevent Petitioner from raising his claims on direct appeal.

14 Petitioner also argues he was unable to file a petition for post-conviction relief in
15 state court because there was some confusion about when the Arizona Court of Appeals
16 issued the mandate in his direct appeal. The Court cannot determine how the uncertainty
17 regarding the issuance of the mandate prevented Petitioner from filing a petition in state
18 court.

19 Petitioner has not identified any sufficient "cause" to justify his failure to comply
20 with Arizona's procedural rules. Therefore, Petitioner cannot rely on the "cause and
21 prejudice" exception that would allow this Court to reach the merits of his claims.

22 Petitioner also invokes the "fundamental miscarriage of justice" exception but does
23 not provide any convincing argument related to this exception. (Doc. 31 at 13). This
24 exception requires Petitioner make "a showing of actual innocence." *Gage v. Chappell*,
25 793 F.3d 1159, 1167 (9th Cir. 2015). Attempting to do so, Petitioner cites additional cross-
26 examination topics he believes his counsel should have explored at trial. Merely
27 identifying additional cross-examination, however, falls well short of the required showing
28 to establish actual innocence. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995) (holding

1 “fundamental miscarriage of justice” exception is “rare” and requires an “extraordinary
2 case”).

3 Finally, pursuant 28 U.S.C. § 2254(b)(2), “[a]n application for a writ of habeas
4 corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust
5 the remedies available in the courts of the State.” Looking to the underlying merits of
6 Petitioner’s claims, he would not be entitled to relief even if he had exhausted his claims.
7 In brief, the alleged errors in the indictment process either are not cognizable on federal
8 habeas or, if cognizable, cannot support relief. *See Glazier v. Cate*, No. CV 12-5692-JFW
9 PLA, 2014 WL 6769619, at *10 (C.D. Cal. Dec. 1, 2014) (“[E]rrors that occur at a state
10 grand jury proceeding do not deprive a defendant of a federally protected right and are not
11 cognizable on habeas review.”); *Atwood v. Schriro*, 489 F. Supp. 2d 982, 1034 (D. Ariz.
12 2007) (“Because the jury ultimately convicted Petitioner of both charged offenses, any
13 error in the grand jury proceeding connected with the charging decision was harmless
14 beyond a reasonable doubt.”). Petitioner has not identified the material evidence the state
15 failed to disclose that, if disclosed, would have created a reasonable probability of a
16 different result. *See Runneagle v. Ryan*, 686 F.3d 758, 769 (9th Cir. 2012) (outlining
17 elements of *Brady* claim). Petitioner has not established any violation of his equal
18 protection or due process rights by police officers or prosecutors. And Petitioner has not
19 identified how his trial or appellate counsel performed below the mandated levels and that
20 he suffered prejudice as a result.

21 Accordingly,

22 **IT IS ORDERED** the Report and Recommendation (Doc. 30) is **ADOPTED IN**
23 **FULL**. The petition for writ of habeas corpus (Doc. 5) is **DENIED**.

24 **IT IS FURTHER ORDERED** the Motions for Relief (Doc. 32, 35) are **DENIED**.

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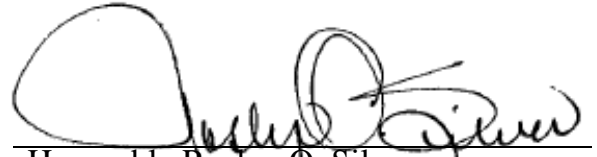
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1 **IT IS FURTHER ORDERED** a Certificate of Appealability and leave to proceed
2 in forma pauperis on appeal are **DENIED** because dismissal is justified by a plain
3 procedural bar and jurists of reason would not find the procedural ruling debatable and
4 because the petition does not make a substantial showing of the denial of a constitutional
5 right.

6 Dated this 17th day of April, 2020.

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11 Honorable Roslyn O. Silver
12 Senior United States District Judge
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